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No. 02-1781

Supreme Court, U.S.
FILED
SEP 27 2003
OFFICE OF THE CLERK

In The

SUPREME COURT OF THE UNITED STATES

ROBERT L. JOSEPH,

Petitioner,

v.

SALT LAKE CITY CORPORATION
STATE OF UTAH

On Petition For Writ Of Certiorari
To The Utah Supreme Court

REPLY TO BRIEF IN OPPOSITION

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Sandy, Utah 84094
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QUESTIONS PRESENTED

1. Whether verbatim reproductions of health information avoids the Privacy Rule under HIPAA?

2. Whether Salt Lake City is a "covered entity" or a "business associate" under HIPAA?

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF UTAH

Robert L. Joseph (hereinafter the "Petitioner") respectfully replies to the new issues addressed by the Respondent Salt Lake City.[1]

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The statutory provision at issue herein is:

Health Information Portability and Accountability Act of 1996.

STATEMENT OF THE CASE.

Since the filing of the parties' briefs, Petitioner obtained a ruling from the Department of Occupational & Professional Licensing that Dr. McCann, the doctor that prepared the Petitioner's evaluation (the individually identifiable health information) at issue, that agreed with Petitioner that Dr. McCann committed malpractice in the evaluation.

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1 Note: It appears that the State of Utah has elected not to appear and oppose the HIPAA claims raised by the Petitioner. As will be demonstrated herein the controversial "individually identifiable health information" is very suspect and never should have been made public by the City's risk manager or by the Utah Court.

REASON FOR GRANTING THE PETITION.

NEW INFORMATION OF MALPRACTICE BRINGS QUESTION OF CONSPIRACY TO LIGHT.

The City, in its Brief in Opposition, again attempts to deprive the Petitioner justice by attempting to corruptly persuade this Court by claiming that Petitioner is a liar and suggesting that he is crazy once again relying on the bogus conclusions of the corrupt Dr. McCann. On page 12 of the City's Brief in Opposition, the City claims that it did not wrongfully disclose individually identifiable health information because it merely quoted the conclusion *verbatim* the health information, suggesting that if it's quoted its not disclosed. A preposterous argument, the City is flat wrong. HIPAA prohibits the "information" from being disclosed not the actual documents themselves. Verbatim information should be safeguarded as much as the originals.

The City then demonstrated that the U.S. District Court Judge, the Honorable Dale A. Kimball, agreed with the City because he quoted the corrupt doctor's conclusion as well, apparently suggesting reliability in the assertion. See Respondent's Appendix 4, pp. 10a-11a. Unfortunately, the City's arguments merely point outs how much easier it is to believe the doctor over a claimant's conspiracy theories.

Nevertheless, Petitioner sets out to correct the record regarding the good Dr. McCann. As this Reply Brief's appendix includes, Dr. McCann's evaluation was an act of malpractice. The conspiracy theory is true. The Petitioner does not have a disorder at all as has been the City's desire. The City, in its corruption, has set it all up! Utah's Division of Occupational Licensing's medical review panel has exonerated Petitioner's name. On September 12, 2003, the panel agreed with Petitioner that Dr. McCann committed malpractice by conducting a

evaluation that "was inadequate and incomplete to reach the diagnosis of Axis II personality disorder . . . [a]s a resulting of this negligence or deviation from the standard of care, it is claimed that Mr. Joseph suffered the loss of his employment and other damages." (Rep. App. 3)

With this information in mind, the Petitioner calls upon this Court to exercise extraordinary power. The circumstances at hand require this Court to accept certiorari. It must review the ***do's and don't's*** associated with health information in light of HIPAA. No matter how this Court looks at it. Dr. McCann's evaluation contained health information. As a physician, HIPAA certainly applies to him. He has a duty to protect Mr. Joseph's information. Even verbatim quotations by others may be injurious as demonstrated in this case if wrongfully disclosed by others. 45 C.F.R. § 164 explains that HIPAA provisions, by statute apply to the following persons:

> (1) A health plan.
> (2) A health care clearinghouse.
> (3) A health care provider who transmits any health information in electronic form in connection with a transaction referred to in section 1320d-2(a)(1) of this title.

Id. In this matter, even if this Court concludes that HIPAA didn't apply against the City because of the City's "health plan" then it certainly applies in this matter because Dr. McCann is a "health care provider" and the City is a business associate of Dr. McCann.

HIPAA defines business associates in 45 U.S.C. § 164.502(e), 164.504(e) and 164.532(d) and (e). HIPAA requires that any shared information requires specific agreements to "safeguard the information from misuse", and that the entity "will help the covered entity comply with some of the covered entities duties under the Privacy Rule." Covered entities may disclose protected health information to an entity in its role as a business associate *only* to help the covered entity carry out its

health care functions – not for the business associate's independent use or purpose, except as needed for the proper management and administration of the business associate.

In this matter, whether directly applied as a covered entity or as a business associate of a covered entity, the City has an affirmative duty under HIPAA to ensure that the health information generated by Dr. McCann was safeguarded. Dr. McCann's conclusions are health information generated against Mr. Joseph. At all times, that information should have been treated "private" and kept away from public scrutiny, even *verbatim* reproductions. Due to the carelessness of the City, the Utah Court of Appeals and now the U.S. District Court, District of Utah have each publicly printed the private health information.

At least in Petitioner's favor, it can now be made public that Dr. McCann's conclusions are wholly unreliable. The evaluation was the product of malpractice because it was merely generated at the behest of the City. Note: The panel recognized that Dr. McCann even altered his opinion by a simple telephone request from the City following the clinical interview. (Rep. App. 4).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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BEFORE THE DIVISION OF OCCUPATIONAL &
PROFESSIONAL LICENCING
DEPARTMENT OF COMMERCE, STATE OF UTAH

ROBERT L. JOSEPH

Petitioner(s)

Case No. PR-03-04-039

-v-

CERTIFICATE OF
COMPLIANCE

DAVID L. McCANN, M.D., F.A.P.A.

Respondent(s),

I, W. Ray Walker, Regulatory & Compliance Officer, Division of Occupational & Professional Licensing, Department of Commerce, hereby certify that all requirement set forth in '78-14'12, Utah Code Ann., 1953 as amended, have been satisfied regarding prelitigation review of te above-entitled matter.

Dated this 17th day of September, 2003.

s/_____
W. Ray Walker
Regulatory& Compliance Officer

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BEFORE THE DIVISION OF OCCUPATIONAL &
PROFESSIONAL LICENCING
STATE OF UTAH

ROBERT L. JOSEPH

Petitioner(s)

PANEL OPINION

-v-

Case No. PR-03-04-039

DAVID L. McCANN, M.D., F.A.P.A.

Respondent(s),

The above-entitled matter was heard Tuesay, August 19, 2003, by Gloria Miley, Richard Spencer, M.D., and Jared Faerber comprising the Prelitigation Panel as required by Utah law. Petitioner Robert L. Joseph ("Mr. Joseph") was present and represented by D. Bruce Oliver. Respondent David McCann, M.D. "Dr. McCann") was present and represented by J. Anthony Eyre.

FACTS

In March of 1999 Mr. Joseph was involved in a shooting incident while acting as a security officer for a private company. The shooting was found to be justified and Mr. Joseph was cleared of any criminal wrongdoing wit regard to the incident.

On January 4, 2000, Mr. Joseph's employer, the Salt Lake

City Police Department, order him to undergo a fitness for duty evaluation including a psychiatric independent medical evaluation performed by Dr. McCann.

Dr. McCann performed his evaluation on February 28, 2000. The evaluation was based on a clinical interview with Mr. Joseph, a clinical information inventory, a mental status examination, psychological testing, and a limited review of medical records. Dr. McCann also reviewed performance evaluations and letters from Mr. Joseph's employer produced in 1998 through February 2000. Dr. McCann also conducted an interview with Police Union President David Greer.

Dr. McCann's assessment was that Mr. Joseph suffered from an Axis II personality disorder with paranoid and narcissistic traits. Dr. McCann concluded that Mr. Joseph as psychologically unsuitable to perform the duties of a police officer.

PETITIONER'S CLAIMS

Mr. Joseph claims that Dr. McCann's evaluation was inadequate and incomplete to reach the diagnosis of Axis II personality disorder. It was alleged Dr. McCann's evaluation failed to explore adequate sources and historical information. As a result of this negligence or deviation from the standard of care, it is claimed Mr. Joseph suffered the loss of his employment and other damages.

DECISION OF THE PANEL

Under Utah law, a physician or other health care provider, is required to exercise the same degree of learning, care and skill possessed by others in good standing practicing in te same medical field. The physician or provider must use the same degree of care that other qualified physicians would exercise under the same or similar circumstances. *See Farrow v. Health*

Servs. Corp. 604 P.2d 474 (Utah 1979). Applying this standard, the Panel finds Petitioner's claims meritorious.

The Panel agrees with Mr. Joseph that Dr. McCann's diagnoses was not adequately supported by his evaluation or the information available. A diagnosis of an Axis II personality disorder requires an enduring and chronic pattern of inflexible personality traits and dysfunctional interactions consistent over a broad range of personal and social situations. The Panel does not believe Dr. McCann's evaluation was adequate to make this type of diagnoses.

Dr. McCann's interview with Mr. Joseph and his review of the records focused almost exclusively on the March 1999 shooting incident and events thereafter. Dr. McCann's interview with David Greer was also inadequate to fully evaluate Mr. Joseph as Mr. Greer had only known Mr. Joseph for a relatively short period of time. The documents reviewed by Dr. McCann were also only during 1998-2000 period. This information simply does not demonstrate the type of long-standing, continuing personality problems necessary for Dr. McCann's diagnoses. Dr. McCann's evaluation focused excessively on one event which cannot show the persistence of personality traits over many difference personal and social situations.

The Panel finds it telling that Dr. McCann changed his initial evaluation and diagnoses when he received further information. This suggests that te initial evaluation and diagnoses was based on inadequate information and that all the information available was not considered.

Based on the foregoing, the Panel finds Mr. Joseph's claim to be meritorious.

DATED this 12th day of September, 2003.

BY s/_____

Jared R. Faerber
Panel Chair